IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

NO. 328

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

MELLON NATIONAL BANK AND TRUST COMPANY,
successor to MELLON NATIONAL BANK,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Common Pleas of Dauphin County, Pennsylvania (R. 154a) is reported at 63 Dauph. Co. Rep. 289. The opinion of the Supreme Court of Pennsylvania (R. 202a) is reported in 374 Pa. 519.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Did the Commonwealth of Pennsylvania, for the year 1934, tax the shares of national banks at a greater rate than was assessed upon other monied capital in Pennsylvania coming into competition with the business of national banks in violation of Section 5219 of the Revised Statutes of the United States, 12 U.S.C.A. 548?

2. After determining that unlawful discrimination in taxing the shares of national banks did exist, and that, to equalize the tax thereon with that on the shares of trust companies, the value of federal securities should be deducted, did the Court properly calculate the tax on the respondent national bank's shares at 4 mills, the rate applicable to national banks, instead of 5 mills, the rate applicable to trust companies?

STATUTES INVOLVED

The statutes involved are set forth in the Appendix to the Petition at pp. 36-40.

STATEMENT OF THE CASE

In 1934 the shares of national banks were taxed at the rate of 4 mills on the value of their capital, surplus and undivided profits by the Act of 1897, P.L. 292, as amended; 72 P.S. 1931.

In 1934 the shares of trust companies (including banks and trust companies) were taxed at the rate of 5 mills on the value of their capital, surplus and undivided profits by the Act of 1907, P.L. 640, as amended; 72 P.S. 1991. But in ascertaining value for tax purposes they were permitted, for the tax year here involved, to deduct the value of their stocks of corporations paying or expressly exempted from paying a capital stock tax and the value of their federal securities (R. 46a).

The Act of 1907 as amended did not *expressly* allow trust companies to deduct the value of their federal securities. The deductions were allowed following a decision of this Court* holding that the allowance of deductions of the value of stocks of Pennsylvania corporations without allowing deductions for federal securities was a discrimination against federal securities and that deductions for both must be allowed. Perhaps so long as the deductions allowed trust companies and denied national banks were limited to the value of their

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* *Schuylkill Trust Co. v. Pennsylvania,* 296 U.S. 113 (1935). This case was decided November 11, 1935 and dealt with the tax year 1930. Since the law permits taxpayers to apply for a resettlement within a period of five years after payment of the tax, the state institutions affected by the decision were able to take advantage of it for the tax year 1934. ("The Fiscal Code", Act of 1929, P. L. 343, Secs. 503 and 1104).

stocks of Pennsylvania corporations, the inequality of treatment was adequately counteracted by the higher tax rate on the shares of the trust companies, and that, since neither identity of the taxing formulae nor mathematical equality of the amounts is required, Section 5219 (12 U.S.C.A. 548) was not violated. But between 1930 and 1934 all banking institutions, national and state, invested large amounts in federal securities and when trust companies were allowed to deduct the value of these securities and national banks were not, an indisputably wide disparity between the *effective* tax rates was created.

It is admitted that since 1923 trust companies have been engaged in the banking business and the Commonwealth concedes that the capital of trust companies and the capital represented by their shares is "other monied capital in substantial competition with" the capital of national banks and the capital represented by their shares (R. 47a, 63a).

In 1934 respondent was taxed $145,783. Its effective rate was 3.99 mills (R. 59a).

Since national banks were permitted deductions only for the value of their shares in other national banks, the effective tax rate of all national banks closely approximated 4 mills. The rate for the 10 largest national banks was exactly the same as respondent's, 3.99 mills (R. 86a-87a). For the 47 national banks with capital of $1,000,000 or more, the rate was 3.92 mills (R. 85a). The rate for all national banks was 3.85 mills (R. 56a-59a).

By comparison, the effective rate for all competing trust companies was 1.9 mills (R. 52a-54a). 50 state institutions with capital of $1,000,000 or more paid an effective rate of 1.66 mills (R. 84a-85a). The rate for the 10 largest trust companies was 1.24 mills (R. 86a).

Respondent's principal competing state institution paid an effective rate of .7 mill (Ex. L). With three times the capital of respondent, this competitor paid less than half the amount of tax.

On the basis of the stipulated facts, the Dauphin County Court found that in the year 1934 the shares of national banks were taxed at a greater rate than the tax on a relatively material part of the other monied capital employed in substantial competition with national banks. It found that the disparity was caused by the deductions allowed state institutions which were denied the national banks. The Court deducted from respondent's base the value of its federal securities and applied the tax rate provided in the Act of 1897. This reduced respondent's tax from $145,783.65 to $15,796.40.

The Supreme Court of Pennsylvania affirmed the judgment of the Dauphin County Court of Common Pleas.

ARGUMENT

The Supreme Court of Pennsylvania has denied Pennsylvania the right to tax national bank shares for the year 1934 without allowing the deductions permitted state institutions. Pennsylvania seeks review by this Court solely on the ground that it claims a right under Section 5219, which its own courts have denied.

But the right to tax respondent's shares has not been denied. The decision is limited to a ruling that, in determining the amount of the tax, the same deductions must be allowed national banks that are allowed state institutions.

The second issue does not involve a federal question. It does not involve a construction of Section 5219. After concluding that the disparity resulted from the failure to allow national banks deductions which are allowed state institutions, the Pennsylvania courts simply applied the 4 mills rate provided in the Act of 1897 instead of the 5 mills rate provided by the Act of 1907. There is certainly nothing in Section 5219 which forbids a state to tax national banks at a *lower* rate than the tax on other competing capital. This issue is solely a state matter and involves merely the choice of the appropriate state statute.

I.

The Decision Below Is Clearly Correct.

The Commonwealth's contention that respondent voluntarily created the disparity by making large investments in federal securities is basically erroneous. Respondent's investments have no effect whatever on its effective tax rate. On the contrary, the disparity was created by the large investments in federal securities made by competing state institutions, for which they were allowed a deduction. When the legislature, in 1936 (1936 First Ex. Sess., P.L. 73, Sec. 1), took measures to correct the discrimination it made no change whatever in the assessment of shares of national banks. It amended the Act of 1907 by taking away from trust companies the right to the deductions which had caused the disparity of treatment.

The argument that Section 5219 was intended to prevent only "hostile and unfriendly" discrimination against national banks was squarely met and rejected by this Court in *First National Bank of Hartford v. City of Hartford,* 273 U.S. 548, 560-561 (1927). In *Schuylkill Trust Co. v. Pennsylvania,* 302 U.S. 506, there was no evidence of any "hostile and unfriendly" discrimination against federal securities.

In reality, the present case involves another application of the underlying doctrine of the *Schuylkill Trust Co.* case. If it is discriminatory to allow a trust company to deduct the value of Pennsylvania securities without allowing a similar deduction for the value of federal securities, it is equally discriminatory to allow state institutions to deduct the value of federal securi-

ties without allowing national banks to make similar deductions.

The Commonwealth's contention that the discrimination is limited to a few exceptional cases of very large national banks and trust companies ignores the admitted facts. It is true that the 10 largest trust companies paid the lowest rate (1.24 mills) and were therefore most favored. But these 10 largest state institutions represented, in the aggregate, $237,606,184 of competing capital (R. 86a). And all trust companies paid an aggregate effective rate of 1.9 mills, which was less than half the national bank rate (R. 52a-54a). A taxing policy under which national banks as a class pay twice the effective rate paid by competing state institutions as a class, is clearly discriminatory. *Whitbeck v. Mercantile National Bank,* 127 U.S. 193; *Pelton v. Commercial National Bank,* 101 U.S. 143; *First National Bank v. Lindsay,* 45 Federal 619 (Reversed on other grounds, 156 U.S. 485); *First National Bank v. Treasurer of Lucas County,* 25 Federal 749 (Appeal Dismissed, 131 U.S. 450).

The fact is that respondent proved much more than was necessary. This Court, in construing Section 5219, has said that "every clear discrimination against national bank shares and in favor of a *relatively material part* of other monied capital employed in *substantial* competition with national banks is a violation of both the letter and the spirit of the restriction." (Emphasis added). *First National Bank of Guthrie Center v. Anderson,* 269 U.S. 341. It would have been sufficient to show that the rate paid by national banks as a class (3.85 mills) was over three times as great as the rate

(1.24 mills) paid by the 10 largest competing trust companies having an aggregate capital of $237,606,184.

Finally, the Commonwealth's suggestions that a disparity in the tax rate of as little as 2 mills is not "substantial" and that it was respondent's burden to show that the discrimination had "the effect of promoting the growth of state banks at the expense of national banks" (Brief, p. 28) are wholly without merit.

"Substantial" is a relative term. Whether 2 mills is substantial depends upon the size of that with which it is compared. 2 mills is one-half of 4 mills and a 4 mills tax is twice as great as a 2 mills tax. In many comparisons 2 inches may be insignificantly small, yet if added to the end of a man's nose it becomes colossal.

There is nothing in Section 5219, or in any of the cases construing it, even remotely suggesting that discrimination is forbidden only where it has the effect of promoting the growth of state banks at the expense of national banks. Section 5219 forbids discrimination *per se*. It compels a substantial equalization of the tax burden. Its operation is not dependent upon whether national banks may, in fact, be strong enough to carry a heavier burden than the burden carried by other competing capital.

II.

There Is No Important Question of Federal Law.

There is no suggestion in petitioner's brief that the present case involves a question of federal law of importance to any one except the Commonwealth of Pennsylvania, whose courts have decided the issues against the Commonwealth. No fundamental question of interpretation of Section 5219 is involved. The issue is primarily factual. What the Commonwealth really seeks is simply another hearing, for which this Court does not grant certiorari. *Magnum Co. v. Coty,* 262 U. S. 159, 163.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

The question in this case is not (as stated by respondent on page 6 of its brief) whether Pennsylvania may tax shares of national banks without allowing the deductions permitted to "state institutions".[1]

The combined effect of the higher rate of 5 mills, with a deduction of federal securities, for shares of Pennsylvania trust company, must be compared with the lower

[1] Respondent's use of the term "state institutions" should not be allowed to obscure the fact that only trust companies are involved in this comparison. Shares of 176 State banks are taxed by Pennsylvania under the same act as shares of national banks: Act of June 15, 1897, P. L. 292, quoted on page 37 of Petition.

rate of 4 mills, without such deduction, for shares of national banks, in order to determine whether the actual or effective rate for national banks is higher than that for trust companies.

Without the deduction of federal securities, the shares of trust companies would pay a tax of 5 mills as compared with the rate of 4 mills for national banks, or twenty-five per cent more.

Whether the combined effect produces a higher rate for shares of national banks necessitates a consideration and construction of R. S. 5219, and is a federal question: *Mercantile Bank v. New York,* 121 U. S. 138, 160 (1887); *Tradesmens Bank v. Tax Commission,* 309 U. S. 560, 567-568 (1940).

The fact that the right claimed by the Commonwealth has been denied by the Supreme Court of Pennsylvania, one of its own courts, is immaterial to the question of jurisdiction.

In Robertson and Kirkham on Jurisdiction of the Supreme Court of the United States, the rule is stated:

> "* * * The state * * * may invoke the appellate jurisdiction of the Supreme Court as against decisions of its own courts limiting the exercise of its taxing power upon federal constitutional grounds." (302-303)

In support, the authors cite *State Tax Commission v. Aldrich,* 316 U. S. 174 (1942) in which this Court reversed a decision of the Supreme Court of Utah, which had held that the State could not impose an inheritance tax upon the transfer of the stock of a Utah corporation owned by a decedent domiciled in New York.

On appeal by a state this Court has reversed constructions of federal statutes made by the highest Court of the State in *California v. Deseret Water, & Co.*, 243 U. S. 415, 417 (1917); *Coleman v. Miller*, 307 U. S. 433, 438, 466 (1939).

Respondent asserts (p. 6) that the "second issue does not involve a federal question". The second issue is discussed on pages 30-32 of petitioner's brief. Calculating the tax of a national bank at 4 mills with the added deduction of federal securities, places national banks on a better basis—at a lower effective date—than trust companies. The Court more than gave national banks an equal rate prescribed by R. S. 5219. It found a greater violation of R. S. 5219 than actually existed. In other words, it overcorrected the alleged discrimination or violation.

The extent, if any, to which the State statute violates R. S. 5219 involves the interpretation of that federal statute, and this question of the interpretation of an act of Congress is a federal question. The Pennsylvania courts taxed the shares of Mellon National Bank at the rate of 4 mills, imposed by the Act of 1897, but also allowed Mellon National Bank the exemption of federal securities which is granted by the Act of 1907 to shares of trust companies upon which the Act of 1907 imposed a rate of 5 mills.

The Pennsylvania courts give the Mellon National Bank a larger measure of relief than a proper construction of R. S. 5219 requires. This issue cannot be determined without a construction of R. S. 5219 and therefore presents a federal question.

Respondent argues (p. 7) that if it is discriminatory to allow a trust company to deduct Pennsylvania securities without a similar deduction for federal securities in the Schuylkill Company case, it is equally discriminatory to allow trust companies to deduct federal securities and not to allow national banks to make a similar deduction.

In the case at bar a trust company's shares pay the rate of 5 mills as against a rate of 4 mills for national bank shares, and the combined effect of the higher rate for trust companies with the deduction must be compared with the lower rate, without the deduction, for national banks. In the Schuylkill case only one tax statute and one rate were involved. No calculation of a combined effect of several factors was necessary. In the case at bar two different statutes and two different rates have to be compared.

Respondent cites (p. 8) *First National Bank of Guthrie Center v. Anderson,* 269 U. S. 341, and argues that in the case at bar there is a discrimination against "a relatively material part of other moneyed capital" (348). In the Guthrie case, however, the bill in equity alleged that within the county there were held $5,000,000 of notes, bonds and other evidences of indebtedness. This "relatively material part of other moneyed capital" was all of this class of moneyed capital, not a part of the class composed of the ten largest investors.

So in our case a "relatively material part" would consist of the shares of all trust companies in comparison with the shares of all national banks. To treat the ten largest trust companies as a "relatively material part of other moneyed capital" would violate the prin-

ciple of classification. The effect of the different rates of tax upon shares of trust companies and national banks can only be determined by comparing all national banks with all trust companies and not the few largest national banks with the few largest trust companies.

In *Cummings v. National Bank,* 101 U. S. 153 (1879) this Court based its decision on a "manifest injustice to a large class of property" (163).

In *People v. Weaver,* 100 U. S. 539 (1879) the Court found discrimination "against this class of property" (543). See also *National Bank v. Kimball,* 103 U. S. 732, 735 (1880).

In *Supervisors v. Stanley,* 105 U. S. 305 (1881) Mr. Justice Miller said:

> "* * * we should be very reluctant to hold that, when it has been shown that a single bank or a single individual has been taxed less than he should be, all other taxes, however just, are thereby invalidated. * * *
>
> "If by this it is supposed that a few individual instances may be shown of partial assessments favoring citizens as compared with the national banks, we think it is erroneous. * * *" (317-318)

Respondent asserts (p. 9) that nothing in R. S. 5219 remotely suggests that discrimination is forbidden only where it promoted the growth of said banks at the expense of national banks. In reply we refer to *Aberdeen Bank v. Chehalis County,* 166 U. S. 440, 457 (1897); *First National Bank v. Hartford,* 273 U. S. 548, 558 (1927); *Amoskeag Savings Bank v. Purdy,* 231 U. S. 373,

389-390 (1913); *Mercantile Bank v. New York*, 121 U. S. 138, 155 (1887).

It has never been the policy of the federal government under R. S. 5219 to interfere with the policy of a State in developing banking corporation: *Jenkins v. Neff*, 186 U. S. 230, 237 (1902); *Mercantile Bank v. New York, supra*, p. 156; *Aberdeen Bank v. Chehalis County, supra*, p. 458.

Respondent argues (p. 10) that the question of federal law in the case at bar is important to no one except the Commonwealth of Pennsylvania.

In reply we refer the Court to the questions presented (pp. 3-4) and the reasons for allowance of appeal (pp. 11-16) in petitioner's brief.

The questions involved in this petition affect all states which tax shares of national banks and State banks and which involve a comparison not only of rates but of deductions. Such a comparison furnished the question involved in a large percentage of the cases decided by this Court under R. S. 5219.

It might be argued with equal plausibility that each of such cases involved a question of federal law of importance only to the State whose courts have decided the issues against the State.

Respondent's brief is based on the effect of the Pennsylvania tax upon the *ten* of the largest national banks out of a class of 715 national banks and as compared with the effect upon the ten largest trust companies out of a class of 236 trust companies. This is a novel kind of classification. How could a State adminis-

ter its tax laws if respondent's position were adopted. It would have to compare a computation of the tax on the shares of every national bank with a computation of the tax on the shares of every trust company.

If the principle of classification is satisfied by comparing the effect of the rate upon a small convenient number of national banks with the effect of a rate upon a small convenient number of trust companies, then the tax statutes and assessments of many states will be invalidated.

Therefore the issue in this case is not primarily factual as respondent asserts (p. 10), but is a question of legal interpretation with which numerous decisions of this Court have been concerned.

Respectfully submitted,

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